United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1235

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IN THE

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ABDON ACEVEDO, et al.,

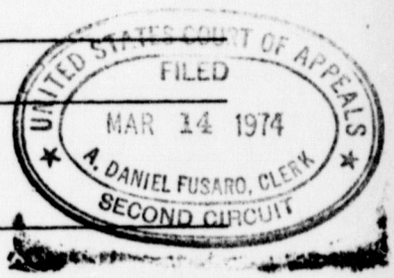
Appellants,

-v-

NASSAU COUNTY, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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INTRODUCTORY STATEMENT

Appellants wish to focus their reply brief primarily on issues raised by appellee General Services Administration in its brief. Appellants will, however, discuss initially several matters raised by Nassau County in its presentation.

I

Appellee Nassau County argues in Point I of its brief that appellants have failed to establish an aggrieved plaintiff within the class of minority citizens who are "eligible for low income housing as defined in state or federal statutes and regulations." In any event, the County argues that the issues raised relate to matters of economics not racial discrimination.

In maintaining that racial questions are not involved in Nassau County's decision to reverse prior plans and to exclude housing from Mitchel Field, the County persists in ignoring the clear and unequivocal findings by the District Court that low-income family housing has been the most vigorously opposed by Nassau residents and that opposition to such housing "has been racially motivated." This case is not a "right to housing" matter as the appellees choose to frame it, but a case which the trial court clearly perceived to involve basic issues of racial discrimination. (See particularly pp. 17-25 of original Brief for Appellants). The County action challenged here does involve denial of housing opportunities; appellants, however, have always premised their challenge to this denial on g r o u n d s that the contested action was racially discriminatory in purpose and effect.

The County's claim as to the individual appellant who testified at trial is most difficult to understand. Apparently, the County argues that appellant Betty Ann Redfern, a Black resident of

Nassau County, faces no housing problem. Yet, the record shows that Redfern, who lives with her four small children, derives her entire income from Social Services and child support, amounting to $191 a month and $65 a month respectively. Social Services pays $292.50 a month towards Redfern's rent on a five and one-half room apartment; but that amount, the maximum Social Services allocates for housing, falls $32.50 short of Redfern's $325 monthly apartment rental. Thus, Redfern is left with only $223.50 a month upon which to live (Tr. 1067-68).

Nor did appellant Redfern have much choice as to where to live and how much to pay for housing. For almost two years, she was forced to reside with her family in a welfare motel. All parties involved in this case agree that the conditions in the welfare motels in Nassau County were simply horrendous. Redfern also testified that her choices of housing in Nassau were restricted by racial discrimination in the housing market (Tr. 1075-76).

It may well be that the apartment Redfern currently rents is not deteriorating, but that does not negate the fact that Redfern has a serious housing problem. Her apartment is too costly for her; her choices of alternative, decent housing are virtually nil; racial discrimination persists, further restricting her housing opportunities; and should she find herself unable to pay the rent (see Tr. 1069-70), there is no supply of low and moderate-income family housing in Nassau to which she can turn.

Certainly, appellant Redfern is an aggrieved party who has

suffered as a result of the County's racially discriminatory action with respect to housing at Mitchel Field and she adequately represents the class as defined by the District Court.

II

In Points III and VI of its brief, the County contends that since it lacks the legal power to construct housing, there is no remedy available to appellants. Appellants would stress, however, that they have never sought an order compelling the County to undertake the construction of housing at Mitchel Field. Appellants challenge only the decision to reverse the long-standing plans to include housing opportunities as part of the overall development plans for the Field. Appellants ask the Court only to return them to the position they occupied prior to the appellees' racially discriminatory determination to block those housing plans. In essence, the relief requested as to Nassau County is that the County plan to include housing among the proposed uses of this tract of land.

This relief is both appropriate and feasible. Although the County lacks the power to build a hotel or a commercial development, it has not been prevented from proceeding with its plans for these uses at Mitchel Field. Perhaps, ultimately, the hotel and commercial undertakings will not materialize if viewed by private investors as economically unsound. But the critical fact is that Nassau County is using its public power and influence, and the authority to plan Mitchel Field, to accomplish those developments. The appellants ask only that the County be ordered to proceed in a similar fashion with respect to vitally needed housing. If the County is able to plan for, approve and promote senior citizen housing in

the Santini section of Mitchel Field, it also can plan for, approve and promote a range of housing opportunities in accordance with the recommendations of the Mitchel Field Development Corporation, Henry Liu, the planner for Mitchel Field, and the Nassau Planning Commission (see Appellants Brief, pp. 5-11).

III

Appellee, GSA, in addition to defending the District Court's judgment that GSA "is complying with the Federal Site Selection Laws," effectively cross-appeals from the District Court's implicit decision that the Court had subject matter jurisdiction of this action. Of course, subject matter jurisdiction is not waivable and may be raised on appeal.

GSA has reasserted essentially three jurisdictional claims. First, GSA claims that the timing of judicial review is inappropriate either because the controversy is not ripe, the challenged administrative action is not final, or the administrative remedy has not been exhausted. Secondly, GSA asserts that appellants lack standing to challenge GSA's compliance with the site selection laws and the Fair Housing Act because they are not persons within a "zone of interest" protected by these statutes and regulations. Finally, GSA contends that Executive Order 11512, on site selection, may not be enforced in a private civil action either because of GSA's "sovereign immunity" or "administrative discretion" in enforcing this order.

GSA's three justiciability contentions, as well as the substantive claim of its compliance with its site selection obligations, ultimately hinge upon GSA's distorted conception of the purpose and function of the site selection laws and their relation to the Fair Housing Act. Thus, the first question to be answered is what

obligation GSA had under these laws and at what point GSA violated that obligation to the injury of appellants.

Ripeness

Executive Order 11512 clearly sets forth a list of requirements that must be fulfilled by GSA in the planning, acquisition and management of federal office space. Section 2 of that Order requires GSA to give consideration "in the selection of sites for Federal facilities" (emphasis added) to "the impact a selection will have on improving social and economic conditions in the area." The Order further requires GSA to consider "the availability of adequate low and moderate income housing" in a potential site area.

In 1971, GSA and HUD entered into a Memorandum of Understanding pursuant to the joint authority of Executive Order 11512, the statutes authorizing this Order, the Fair Housing Act, and the Housing Act of 1949. The Memorandum amplifies and implements the federal agencies' mutual obligation to assure that low and moderate-income housing is available on a non-discriminatory basis in an area under consideration as a site for a federal public building. The Memorandum specifically directs GSA to consult with, and receive advice from, HUD with respect to "present and planned availability of low and moderate income housing on a non-discriminatory basis" in the project area "during the survey, preliminary to the preparation and submission of a project development report . . . ." (emphasis added) HUD-GSA Memorandum, para. 9(c)(1).

It is undisputed on the record that GSA prepared and

forwarded to the Office of Management and Budget (OMB) a revised project prospectus in January, 1973 with a view to OMB's approval and subsequent submission to Congress. (Bogardus affidavit, Brief of Appellee GSA, Addendum No. 2. p. 3.) It is also undisputed that GSA had not consulted with HUD, nor had it conducted studies of the availability of low and moderate-income housing prior to the date of submission of the project prospectus to OMB for processing (GSA's Brief, p. 5, 693-A). Simultaneous with this submission, GSA consulted HUD and, as a result of this consultation, GSA surveyed federal agencies requesting space in the proposed project to ascertain the racial and economic characteristics of federal employees likely to work at the facility [697-A].

The federal regulations cited, supra, make it abundantly clear that GSA has the responsibility to consider the socio-economic impact of a proposed federal facility and the availability of low-cost housing prior to making a decision about the site. Any other view makes a meaningless ritual of the inquiries mandated by the Executive Order and the Memorandum of Understanding. By forwarding the Prospectus to OMB without complying with site-selection policies, GSA committed itself to an office building at the site. This final agency action irrevocably denied appellants their right to have the housing availability and socio-economic conditions of Nassau County appraised and considered as part of the site determination. It is little solace to appellants that GSA is polling federal employees as an afterthought to its site decision, particularly when there is no

evidence, even at this time, that either HUD or GSA will ever consider the housing availability in Nassau County.

As of GSA's action in January, 1973, this controversy became ripe for adjudication and there was no administrative remedy left to exhaust. The classic formulation of when administrative action becomes final for purposes of judicial review is Chief Justice Stone's statement in Columbia Broadcasting System v. United States, 316 U.S. 407 (1942):

> The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control. (at 425)

Thus, administrative decisions are ordinarily reviewable when "they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process." Isbrandtsen Co. v. United States, 211 F.2d 51,55 (D.C. Cir. 1954), cert. denied 347 U.S. 990 (1954).

The federal courts have been particularly reluctant to require further exhaustion of administrative remedies in actions challenging the civil rights enforcement efforts of federal agencies under the Civil Rights Acts. Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971); Shannon v. HUD, 436 F.2d 809 (3rd Cir. 1970), and

Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973).

In Shannon, supra, the Third Circuit Court of Appeals succinctly stated the law of exhaustion for actions under the "affirmative obligation" section of Title VIII (42 U.S.C. 3608(d)(5)):

> Defendants contend that the interests which plaintiffs seek to vindicate are adequately protected by the complaint and enforcement procedures of Title VIII of the Civil Rights Act of 1968, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1. They contend plaintiffs could have and did not exhaust enforcement remedies therein provided. We do not agree.
>
> * * *
>
> The complaint and enforcement procedures do not pertain to the Secretary's affirmative duties under 808(d)(5) of the 1968 Act.

Plainly, appellants should not be required to engage in a futile complaint under Title VIII with respect to GSA's parallel obligation to "affirmatively" promote fair housing in connection with the site selection for federal facilities. 42 U.S.C. 3608d.

The Bogardus affidavit, submitted originally by GSA on February 26, 1974 in opposition to appellants' application for an injunction pending appeal, indicates that OMB has returned the January 1973 prospectus to GSA because of the withdrawal of some federal agencies from the project. The affidavit also states that GSA has "deferred" all action under the Executive Order and Title VIII "until the identity of all federal agencies to be housed and

their space and utilization requirements in the federal complex have been ascertained and final decision made on the details of the proposed project funding." Obviously, GSA has not learned its lesson and is not retreating from its position that the study of socio-economic impact and housing availability should occur ex post facto - i.e., once the site and its occupants have been finally determined and the prospectus forwarded to OMB and to the Congress for approval.

In the one federal decision in this area, Judge Judd of the Eastern District of New York granted a preliminary injunction against the disposal of housing units at the Suffolk County Air Force Base because GSA had not obtained advice from HUD on "the adequacy of low income housing on a non-discriminatory basis before seeking a site for a new federal facility." Brookhaven v. Kunzig, Memorandum Opinion On Motion to Dissolve Injunction, No. 71-C-1001 (E.D.N.Y.) July 20, 1972) (emphasis added). Contrary to the government's assertion in its brief (p. 11), the appellants need not wait until the project in question receives final approval. By that time, there may be no effective remedy available for their injury.

At the very least, appellants are entitled to a declaratory judgment that GSA has not complied with the site-selection laws and the Fair Housing Act on the past prospectus and should do so before submitting another prospectus to OMB and the Congress. NAACP Western Region v. Brennan, 360 F. Supp. 1006 (1973), (Granting a

declaratory judgment against the Department of Labor with respect to its civil rights obligations even though the Department had just initiated a plan for civil rights enforcement.)

Standing

GSA also argues that appellants lack standing because they are not within the zone of interests protected either by Executive Order 11512 or the Fair Housing Act. GSA first contends that the Executive Order only applies to housing for Government employees and thus, appellants are not within the class of persons protected by this Order. The Court in the first Brookhaven opinion dealt with this contention summarily, stating,

> It is true that none of the plaintiffs are employees at the new IRS facility, but there is no one else at present in a position to represent the prospective employees. Moreover, non-employees may be affected by increased demand for low-income housing, and come within the ambit of those affected by "the impact a selection will have on improving social and economic conditions in the area" (Subsection 2). 341 F. Supp. 1026, 1029

This view is entirely consistent with recent Federal decisions broadening the notion of parties "aggrieved" by administrative action and thus entitled to judicial review under the Administrative Procedure Act. Hardin v. Kentucky Utility Co., 390 U.S. 1 (1968), Scanwell Laboratories v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970), Air Reduction Company v. Hickel, 420 F.2d 592 (D.C. Cir. 1969).

In Shannon, supra, an extremely relevant decision for

the instant case, the court held that the black homeowners and civil rights organizations of an urban renewal area in Philadelphia had standing to challenge the alleged concentration of lower-income black persons in a federally subsidized housing project in their neighborhood. The Shannon court stated, "The plaintiffs here, perhaps more than the displaced and relocated former residents [of the urban renewal area] or the potential occupants of new housing, are vitally affected by the adequacy of the particular program of community improvement for the preservation of a residential community with decent homes and a suitable living environment which they seek to challenge." 436 F.2d at 818. See also Trafficante v. Metropolitan Life Insurance Co., 93 S. Ct. 364 (1973).

In addition to the individual low-income, minority appellants, there are two civil rights organizations from Nassau County whose members presently suffer from a lack of adequate low and moderate income housing on a non-discriminatory basis throughout the County. The Supreme Court has recently adopted an extremely liberal view of institutional plaintiffs and their standing to challenge federal administrative action which adversely affects interest of individual members of the association. United States v. Students Challenging Regulatory Agency Proceedings (SCRAP), 93 S.Ct. 2405 (1973).

GSA's final standing argument is equally without

merit - i.e., that site location of federal facilities is not an activity covered by the "affirmative" fair housing obligation imposed on federal agencies administering programs "relating to housing and urban development." Ironically, the very GSA regulation cited for the proposition that housing availability only pertains to federal employees, 41 C.F.R. § 101-17.104-1 (GSA's Brief, p. 14) makes it clear that GSA, at least, views the site selection laws as an attempt to implement the Fair Housing Act. In any event, the Executive Order and the Fair Housing Act are jointly implemented by the Memorandum of Understanding. As the District Court in the second Brookhaven opinion makes clear, low-income minority residents of an area have standing to judicially compel HUD and GSA to implement this Memorandum whatever its statutory sources may be:

> Even if GSA was not literally bound by the specific terms of the Memorandum of Understanding, [because it] was signed after the final choice of the Brookhaven site for the IRS Facility provides guidelines to indicate what course of conduct can be considered to satisfy the requirements of the Executive Order. Memorandum Opinion, pp. 10-11.

Plaintiffs-appellants have standing to challenge GSA's persistent violations of these site selection laws and Fair Housing Act policies.

Enforcement of Executive Orders

GSA finally argues that appellants may not enforce Executive Order 11512 in a private civil action and relies on a series of cases involving claims of employment discrimination. These cases fall into essentially two categories, both of which are inapplicable to appellants' action against GSA.

The first category includes actions against private employers that have government contracts by an employee alleging discrimination in hiring or promotion. Farmer v. Philadelphia Electric Company, 329 F.2d 3 (3rd Cir. 1964); Farkas v. Texas Instrument, Inc., 375 F.2d 629 (5th Cir. 1967); Braden v. University of Pittsburgh, 343 F. Supp. 836 (W.D. Penn. 1972), vacated on other grounds, 477 F.2d 1 (3rd Cir. 1973). These cases merely hold that Executive Orders establishing non-discriminatory employment provisions in federal contracts with private employers may not be enforced by an employee in a private civil action in federal district court on a "third-party beneficiary" theory. Each of these decisions explicitly holds that "Executive Orders have the force of federal law" and that " the federal courts have jurisdiction over such controversies." Braden, 343 F. Supp. at 840; Farmer, supra; Farkas, supra. These courts continue, however, to find that the Executive Orders in question did not contemplate a federal civil action against private employers.

The second line of cases cited by GSA involves employment

claims for promotions and wages against federal employers. The principal decision in this area is Gnotta v. United States, 415 F.2d 1271 (8th Cir. 1969), in which the Court of Appeals dismissed an action by an employee of the Army Corps of Engineers alleging discrimination in promotions in violation of an Executive Order governing federal employees. The decision rests on the Court's conclusion 1) that the Executive Order in question established an administrative remedy which the plaintiff had ignored, 2) that promotion of employees was particularly committed to the administrative discretion of the agency, and 3) that a claim for damages and promotion was one where the "judgment sought would expend itself on the public treasury or domain, or interfere with the public administration" and, thus, was barred by sovereign immunity. Land v. Dollar, 330 U.S. 731, 738 (1947); Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949). The Court then concluded that the Executive Order could not, by its terms, be viewed as a waiver of this immunity. Significantly for the instant case, the Gnotta court indicated that the Executive Order, in addition to providing an administrative remedy, might be enforced "under the Civil Rights Act of 1964." 415 F.2d at 1275.

First, it should be noted that Gnotta, supra, and the line of cases it generated [see Kuhl v. Hampton, 451 F.2d 340 (8th Cir. 1971); Blaze v. Moor, 440 F. 2d 1348 (5th Cir. 1971)] has recently been severely criticized and not followed by the Court of Claims in Chambers v. United States, 451 F.2d 1045 (1971).

In any event, Executive Orders which relate to the

internal administration of federal employees and which specifically involve claims for money damages and administrative discretion are typical examples of actions protected by sovereign immunity. Thus, enforcement of these Orders present vastly different considerations than those raised in this appeal. Appellants here clearly have an action against GSA under the Fair Housing Act and the Memorandum of Understanding which was promulgated as a joint regulation to govern the behavior of both agencies. This independent jurisdictional basis under the Fair Housing Act is exactly the element which the Eighth Circuit found lacking in Gnotta, supra. The District Court in Brookhaven, supra, was correct in its view that the Executive Order as implemented by the Memorandum of Understanding be used as a guideline to assess GSA's Fair Housing Act responsibilities when selecting a site for a major federal facility. 341 F. Supp. at 1029.

The failure of GSA to abide by the Executive Order, its own internal regulations, and the Fair Housing Act, presents a classic federal question which may be reviewed by this Court under federal question jurisdiction, 42 U.S.C. 1331, the Administrative Procedure Act, 5 U.S.C. 702, and the Fair Housing Act, 42 U.S.C. 3604. Finally, this action falls within the equally classic exception to the doctrine of sovereign immunity wherein aggrieved persons are allowed to challenge administrative actions alleged to be in abuse of statutory or regulatory authority. Toilet Goods v. Gardner, 360 F.2d 622, aff'd 387 U.S. 158 (1967); Citizens to Preserve

Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Hammond v. Lenfest, 398 F.2d 705 (2nd Cir. 1968); Shannon v. HUD, supra.

For all these reasons, the appellants are persons within the "zone of interest" of the site selection laws and regulations. They were injured by GSA's blatant disregard of these laws until a point in time after which these laws were of no practical effect. In light of GSA's own statement that it will continue to pursue this policy (Bogardus affidavit, supra), this Court should reverse the District Court and enter the appropriate declaratory and injunctive relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 12th day of March, 1974, two copies of Appellants' Reply Brief were served on counsel for appellees, via first class mail, postage prepaid, as follows:

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